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FORMIS RESOURCES BHD & ORS v. RISK MANAGEMENT AND SAFETY SYSTEM PTY LTD & ORS AND OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
IDRUS HARUN JCA
B MARY LIM JCA
[CIVIL APPEALS NO: W-02(NCVC)(W)-1337-08-2014, W-02(NCVC)(W)-1383-08-2014, W-02(NCVC)(W)-1384-08-2014 & W-02(NCVC)(W)-1407-08-2014]
28 JULY 2016

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COMPANY LAW: *Separate legal entity – Lifting of corporate veil – Whether there was necessity to lift corporate veil – Whether directors could be made liable for claims by subsidiary company*

D ***COMPANY LAW:*** *Separate legal entity – Lifting veil of incorporation – Arbitration award made against subsidiary company – Claim for payment of arbitration award – Whether there was existence of scheme to deprive plaintiff of fruits of arbitration – Whether scheme comprised of merely events and matters which occurred in general scheme of doing business – Whether corporate veil of subsidiary company ought to be lifted to attach liability on directors*

E

CIVIL PROCEDURE: *Trial – Submission of no case to answer – Whether trial court adopted wrong test*

Risk Management and Safety System Ptd Ltd ('the plaintiff') was an Australian company. Formis Bass Software Sdn Bhd ('the 12th defendant'),
F was a private limited company, wholly-owned by Formis Resoures ('the first defendant'). The second to the 11th defendants were at all material times, directors of Formis Resources. At the same time, the second and fifth defendants were also directors of Formis Bass Software Sdn Bhd. Bioserasi Sdn Bhd ('the 13th defendant') was also a private limited company having
G an issued and fully paid up capital of RM2. The plaintiff and the 12th defendant entered into an agreement whereby the plaintiff authorised the 12th defendant to license third parties to use the plaintiff's software in return for commissions based on licence fees generated for a period of three years. These contracting parties fell into dispute, which was referred to arbitration
H in Singapore. The arbitral tribunal rendered a partial award and arbitration costs in the plaintiff's favour. Both awards were not paid by the 12th defendant. In the circumstances, the plaintiff instituted a claim against all the defendants. The plaintiff contended that the partial award was received by the plaintiff on 2 April 2012 but on 30 March 2012, the first to the 11th defendants had come up with a scheme to deprive the plaintiff of the fruits
I of its arbitration and the benefits under the agreement by stripping the 12th defendant of its business and assets, ceasing its operation and removing the 12th defendant from the Formis Group by selling it to the 13th defendant,

a dormant RM2 company, for RM1. The High Court Judge was of the view that the manoeuvre was a clear act to frustrate the plaintiff's enjoyment of the partial award. In the circumstances, after the defendants' submission of no case to answer, the High Court Judge allowed the plaintiff's claim. Dissatisfied, the defendants filed four separate appeals against the decision of the High Court.

Held (allowing appeals with costs)
Per Mary Lim JCA delivering the judgment of the court:

(1) The burden of proof lies with the plaintiff. The plaintiff has to establish its case on a civil burden of probabilities. Where the defendant opts to submit that there is no case to answer or meet at the close of the plaintiff's case, the defendant is perfectly entitled to do so under the law. However, where the defendants do not lead evidence to prove its defence or discharge the onus of proof which may have shifted to the defendant, then all that was available for the court to examine in order to determine the claim would be the plaintiff's version of the facts. It is in that context that evidence adduced by the plaintiff are assumed to be true, correct or accurate as the court does not have any other version or evidence for comparison or evaluation. (paras 30 & 31)

(2) The basic relationship was between the plaintiff and the 12th defendant and the relationship was purely contractually based on the agreement, and that the claim was for the sums arising under that agreement, the plaintiff's action against parties other than the 12th defendant must first surmount the fundamental principle of separate corporate legal entity. This principle stood in the way of the plaintiff's claim and it was a principle that the court could not ignore. (paras 35 & 36)

(3) The events complained of were all events and matters which routinely occur in the corporate world and in the general scheme of doing business or running a corporation. The transactions and decisions of companies, though under one group of companies, remain the individual decisions of the particular company. There is no obligation in law for any one of the companies in the group, or for the holding company, to be liable for the obligations of another within the group. For that matter, there is no obligation for a subsidiary to be liable for the obligations of its holding company. The present arrangements between the first defendant and the 12th defendant were no different. The directors or the board of directors who sat in both companies were necessary so that these corporate soles may conduct business as the 12th defendant was an artificial sole. This did not mean that the directors incurred or took on personal liability. (paras 36 & 38)

(4) The plaintiff's case is that the first and 13th defendant had given personal or separate undertakings to the plaintiff in respect of the 12th defendant's obligations under the agreement. The liability of these directors and these other companies were limited by and under the law. The fact that these directors may be common to any number of companies did not alter the basic tenet of corporate law. (para 38)

(5) In order to make any case for any cause of action, the plaintiff must first and foremost, succeed in its proposition that the veil of incorporation of the 12th defendant has to be lifted. The law will only countenance the lifting of the veil of incorporation if fraud is established. On the facts of this case, there were two veils that the plaintiff would have to pierce successfully. First, the plaintiff must succeed in establishing a case for piercing the veil of incorporation of the 12th defendant in order to hold the second and fifth defendants accountable. Second, the plaintiff must also establish a proper case of fraud before it was allowed to pierce another veil of another corporate sole, that of the first defendant's in order to render the remaining defendants who were the directors of the first defendant, jointly and severally liable for the matters complained of. (paras 39 & 41)

(6) At the time of filing of the suit, it was unclear if any cause of action had arose as the plaintiff had yet to secure a recognition of the awards under the Arbitration Act 2005. Anything prior to that date would be premature. Further, the plaintiff's allegation that the defendants were liable for the 12th defendant not being able to satisfy its obligations under the agreement was the matter of how any company or person's inability to pay or satisfy a debt became the liability of another. Until that inability was crystallised into a debt, it remained purely an allegation which was no merit. Until that refusal and non-payment is manifested in an enforcement proceedings, there was no cause of complaint. A person or corporate sole may display lack of financial ability to pay but that is immaterial as a debt may be settled or paid by any other means. With had no actionable claim established in law, the plaintiff's claim was not proved and consequently, must stand dismissed. (paras 43, 45 & 46)

(7) Given the circumstances, events and matters construed and inferred by the High Court Judge as amounting to a scheme with fraudulent overtones were in fact ordinary transactions and decisions of business and commerce. Further, these same circumstances, events and matters occurred over a period of time were well before the plaintiff and the twelfth defendant were in contract; and these events were unrelated to the award. There was nothing untoward let alone sinister in the first defendant or the directors knowing of the arbitration or that an award would be rendered. Knowledge of these matters is not and does not amount in law to intent to defraud or commit any of the torts complained of. (paras 52, 54 & 56)

***Bahasa Malaysia** Headnotes*

Risk Management And Safety System Ptd Ltd ('plaintif') adalah sebuah syarikat Australia. Formis Bass Software Sdn Bhd ('defendan ke-12'), adalah sebuah syarikat sendirian berhad, yang dimiliki sepenuhnya oleh Formis Resources ('defendan pertama'). Defendan kedua sehingga defendan ke-11 adalah pada setiap masa material, pengarah Formis Resoures. Pada masa yang sama, defendan kedua dan kelima juga adalah pengarah Formis Bass Software Sdn Bhd. Bioserasi Sdn Bhd ('defendan ke-13') adalah sebuah syarikat sendirian berhad yang mempunyai modal terbitan dan berbayar sebanyak RM2 sepenuhnya. Plaintif dan defendan ke-12 memeterai satu perjanjian di mana plaintif membenarkan defendan ke-12 untuk memberi lesen kepada pihak ketiga untuk menggunakan perisian plaintif sebagai balasan untuk komisen berdasarkan bayaran lesen yang dihasilkan untuk tempoh tiga tahun. Pihak-pihak kontrak membuat pertikaian dan pertikaian tersebut dirujuk kepada timbang tara di Singapura. Tribunal timbang tara memberikan award separa dan kos timbang tara memihak kepada plaintif. Kedua-dua award tidak dibayar oleh defendan ke-12. Oleh itu, plaintif membuat tuntutan terhadap kesemua defendan. Plaintif menegaskan bahawa award separa diterima oleh plaintif pada 2 April 2012 tetapi pada 30 Mac 2012, defendan pertama sehingga defendan ke-11 telah membuat suatu skema yang menafikan plaintif daripada mendapat hasil timbang tara dan manfaat di bawah perjanjian dengan melucutkan defendan ke-12 daripada perniagaan dan asetnya, menghentikan operasi dan mengeluarkan defendan ke-12 daripada Kumpulan Formis dengan menjualnya kepada defendan ke-13, sebuah syarikat RM2 tidak aktif, untuk RM1. Hakim Mahkamah Tinggi membuat dapatan bahawa tindakan tersebut merupakan satu tindakan yang jelas untuk mengecewakan plaintif daripada mendapat award separa. Oleh demikian, selepas hujahan tiada kes untuk dijawab oleh defendan-defendan, Hakim Mahkamah Tinggi membenarkan tuntutan plaintif. Tidak berpuas hati, defendan-defendan memfailkan empat rayuan berasingan terhadap keputusan Mahkamah Tinggi.

Diputuskan (membenarkan rayuan-rayuan dengan kos)
Oleh Mary Lim HMR menyampaikan penghakiman mahkamah:

(1) Beban pembuktian terletak pada plaintif. Plaintif harus membuktikan kesnya berdasarkan beban kebarangkalian sivil. Jika defendan memilih untuk mengemukakan hujahan tiada kes untuk dijawab di akhir kes plaintif, defendan berhak berbuat demikian di bawah undang-undang. Walau bagaimanapun, apabila defendan tidak mengemukakan keterangan untuk membuktikan pembelaannya atau melepaskan tanggungjawab pembuktian yang berkemungkinan beralih kepada defendan, maka apa yang sedia ada di hadapan mahkamah untuk meneliti bagi menentukan tuntutan adalah versi fakta daripada plaintif. Adalah dalam konteks tersebut bahawa keterangan yang dikemukakan

A oleh plaintif harus dianggap benar, betul atau tepat kerana mahkamah tidak mempunyai versi atau keterangan lain untuk perbandingan atau penilaian.

(2) Hubungan asas adalah antara plaintif dan defendan ke-12 dan hubungan tersebut adalah semata-mata berdasarkan kontrak perjanjian, dan
B tuntutan adalah untuk jumlah wang yang berbangkit daripada perjanjian, tindakan guaman plaintif terhadap pihak lain selain daripada defendan ke-12 perlu mengatasi prinsip asas entiti perundangan korporat yang berasingan terlebih dahulu. Prinsip ini menghalang tuntutan plaintif dan ia adalah satu prinsip yang tidak boleh diendahkan oleh mahkamah.

C **(3)** Perkara-perkara yang diadu adalah perkara yang dilakukan secara rutin dalam dunia korporat dan skema umum dalam menjalankan perniagaan atau menjalankan koperasi. Urusniaga dan keputusan syarikat, walaupun di bawah satu kumpulan syarikat, kekal menjadi keputusan syarikat individu tertentu. Tiada kewajipan undang-undang bagi mana-mana
D syarikat dalam kumpulan tersebut, atau bagi syarikat pegangan, supaya bertanggungjawab terhadap obligasi lain dalam kumpulan. Oleh itu, tidak ada kewajipan untuk anak syarikat bertanggungan atas obligasi syarikat pegangan. Pengaturan yang dibuat antara defendan pertama dan defendan ke-12 tidak berbeza. Pengarah atau lembaga pengarah yang
E duduk di kedua-dua syarikat adalah perlu supaya badan korporat tunggal ini boleh menjalankan perniagaan kerana defendan ke-12 adalah suatu entiti buatan. Ini tidak bermakna bahawa pengarah menanggung atau mengambil tanggungan persendirian.

(4) Kes plaintif adalah bahawa defendan pertama dan ke-13 telah
F memberikan aku janji peribadi atau berasingan kepada plaintif berkenaan obligasi defendan ke-12 di bawah perjanjian tersebut. Liabiliti pengarah dan syarikat-syarikat lain terhad oleh dan di bawah undang-undang. Fakta bahawa pengarah-pengarah ini berkemungkinan sama bagi beberapa syarikat tidak mengubah prinsip asas undang-undang
G korporat.

(5) Untuk membuktikan sebarang kes untuk sebarang kausa tindakan, plaintif harus terlebih dahulu, berjaya dalam hujahan bahawa tirai pemerbadanan defendan ke-12 disingkap. Undang-undang hanya akan membenarkan penyingkapan tirai pemerbadanan jika frod dibuktikan.
H Berdasarkan fakta kes ini, terdapat dua tirai pemerbadanan perlu di singkap oleh plaintif. Pertama, plaintif harus berjaya membuktikan kes untuk penyingkapan tirai pemerbadanan defendan ke-12 untuk menjadikan defendan kedua dan defendan ke-12 bertanggungjawab. Kedua, plaintif juga mesti membuktikan kewujudan kes frod sebelum
I dibenarkan menyingkap entiti tirai perbadanan korporat yang lain, iaitu

defendan pertama bagi membolehkan defendan-defendan lain yang merupakan pengarah defendan pertama, secara bersama dan berasingan bertanggungjawab terhadap perkara-perkara yang diadukan.

(6) Pada masa pemfailan tindakan guaman ini, adalah tidak jelas jika terdapat apa-apa kausa tindakan yang berbangkit kerana plaintif mendapat pengiktirafan award di bawah Akta Timbang Tara 2005. Apa-apa tindakan sebelum tarikh tersebut adalah pra-matang. Selanjutnya, dakwaan plaintif bahawa defendan-defendan bertanggungjawab terhadap ketidakupayaan defendan ke-12 untuk memenuhi obligasinya di bawah perjanjian adalah soal bagaimana mana-mana syarikat atau ketidakupayaan seseorang untuk membayar atau melangsaikan hutang menjadi tanggungjawab pihak lain. Sehingga ketidakupayaan tersebut menjadi hutang, ia kekal menjadi dakwaan yang tidak bermerit. Sehingga keengganan dan kegagalan membayar dibawa ke prosiding penguatkuasaan, kuasa aduan tidak terbangkit. Seseorang atau entiti korporat mungkin menunjukkan kekurangan keupayaan kewangan untuk membayar tetapi ia adalah tidak material kerana hutang boleh dijelaskan atau dibayar dengan cara-cara yang lain. Tanpa ketiadaan tuntutan sah dari segi undang-undang, tuntutan plaintif gagal dibuktikan dan harus ditolak.

(7) Memandangkan keadaan, peristiwa dan perkara-perkara yang ditafsirkan dan disimpulkan oleh Hakim Mahkamah Tinggi sebagai terjumlah kepada suatu skema frod adalah sebenarnya transaksi dan keputusan perniagaan dan perdagangan biasa. Selanjutnya, keadaan yang sama, peristiwa dan perkara-perkara dilakukan dalam tempoh masa sebelum plaintif dan defendan ke-12 memeterai kontrak; dan peristiwa-peristiwa ini tidak berkaitan dengan award tersebut. Tiada apa-apa yang tidak diduga atau jahat pada defendan pertama atau pengarah-pengarah untuk mengetahui kewujudan penimbangtaraan atau award yang akan diberikan. Pengetahuan perkara-perkara ini bukanlah dan tidak terjumlah dari segi undang-undang sebagai niat frod atau melakukan mana-mana tort yang diadukan.

Case(s) referred to:

Abdul Manaf Mohd Ghows & Ors v. Nusantara Timur Sdn Bhd [1997] 4 CLJ 437 CA ***(refd)***

Heller Factoring (M) Sdn Bhd (Formerly Known As Matang Factoring Sdn Bhd) v. Metalco Industries (M) Sdn Bhd [1995] 3 CLJ 9 CA ***(refd)***

Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors [2005] 3 CLJ 355 CA ***(refd)***

Lim Swee Khiang and Another v. Borden Co (Pte) Ltd and Others [2006] 4 SLR 745 ***(refd)***

Pamol (Sabah) Ltd & Anor v. Joseph Paulus Lantip & Ors [2012] 1 LNS 466 CA ***(refd)***

PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd [1980] 1 LNS 55 FC ***(refd)***

Salomon v. Salomon Co Ltd [1897] AC 22 ***(refd)***

Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***

Solid Investments Ltd v. Alcatel Lucent (Malaysia) Sdn Bhd [2014] 3 CLJ 73 FC ***(refd)***

A *Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Naim [2015] 2 CLJ 1037 FC* ***(refd)***

Tenaga Nasional Bhd v. Irham Niaga Sdn Bhd & Anor [2011] 1 CLJ 491 CA ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 218, 304

B Evidence Act 1950, ss. 106, 114(g)

(Civil Appeal: W-02(NCVC)(W)-1337-08-2014)

For the appellant - Cyrus Das, Robert Low, Shamala Balasundram & Tai Hui Xian; M/s Chooi & Co

For the 1st respondent - Dhinesh Bhaskaran & Denise Tan; M/s Shearn Delamore & Co

For the 2nd & 3rd respondents - Sri Kumar Chornalingam & Shankar Govinth

C *Balachandran; M/s Kumar Partnership*

For the 4th respondent - Teoh Weng Seng; M/s Weng Seng & Co

For the 5th respondent - David Thomas Mathews & Tina Francis; M/s Mathews Hun Lachimanan

(Civil Appeal: W-02(NCVC)(W)-1383-08-2014)

D *For the appellant - Sri Kumar Chornalingam & Shankar Govinth Balachandran; M/s Kumar Partnership*

For the 1st respondent - Dhinesh Bhaskaran & Denise Tan; M/s Shearn Delamore & Co

For the 2nd-10th respondents - Cyrus Das, Robert Low, Shamala Balasundram & Tai Hui Xian; M/s Chooi & Co

For the 11th respondent - Teoh Weng Seng; M/s Weng Seng & Co

E *For the 12th respondent - David Thomas Mathews & Tina Francis; M/s Mathews Hun Lachimanan*

(Civil Appeal: W-02(NCVC)(W)-1384-08-2014)

For the appellant - David Thomas Mathews & Tina Francis; M/s Mathews Hun Lachimanan

F *For the 1st respondent - Dhinesh Bhaskaran & Denise Tan; M/s Shearn Delamore & Co*

For the 2nd, 4th, 5th, 7th, 8th, 9th, 10th, 11th & 12th respondents - Cyrus Das, Robert Low, Shamala Balasundram & Tai Hui Xian; M/s Chooi & Co

For the 3rd & 6th respondents - Sri Kumar Chornalingam & Shankar Govinth Balachandran; M/s Kumar Partnership

For the 13th respondent - Teoh Weng Seng; M/s Weng Seng & Co

G

(Civil Appeal: W-02(NCVC)(W)-1407-08-2014)

For the appellant - Teoh Weng Seng; M/s Weng Seng & Co

For the 1st respondent - Dhinesh Bhaskaran & Denise Tan; M/s Shearn Delamore & Co

For the 2nd, 4th, 5th, 7th, 8th, 9th, 10th, 11th & 12th respondents - Cyrus Das, Robert Low, Shamala Balasundram & Tai Hui Xian; M/s Chooi & Co

H *For the 3rd & 6th respondents - Sri Kumar Chornalingam & Shankar Govinth Balachandran; M/s Kumar Partnership*

For the 13th respondent - David Thomas Mathews & Tina Francis; M/s Mathews Hun Lachimanan

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: 22NCVC-439-04-

I *2012 (overruled).]*

Reported by Sandra Gabriel

JUDGMENT

Mary Lim JCA:

[1] For ease of reference, the parties will be referred as they were in the original suit before the High Court.

[2] These four appeals are taken together. All 13 defendants in the action have appealed against the decision made against them. The appellants in the second appeal (W-02(NCVC)(W)-1383-08-2014) were the second and fifth defendants whereas in the third (W-02(NCVC)(W)-1384-08-2014) and fourth appeals (W-02(NCVC)(W)1407-08-2014), the appellants were the 13th and 12th defendants respectively. The appellants in the first appeal (W-02(NCVC)(W)-1337-08-2014) comprise of the remaining nine defendants. We heard the appeals on 2 February 2016 and had stood down the matter for decision on a date to be informed to the parties. This is our decision.

The Arbitration

[3] The plaintiff is an Australian company specialising in providing "Enterprise Risk Intelligence" solutions and delivering integrated risk compliance, event and claims management software. The first defendant is a public limited company incorporated in Malaysia. It is listed on the Main Board of Bursa Malaysia Berhad. The 12th defendant on the other hand, is a private limited company, wholly owned by the first defendant. The second to the 11th defendants were at all material times, directors of the first defendant. At the same time, the second and fifth defendants were also directors of the 12th defendant. In other words, the first and 12th defendants have common directors in the second and fifth defendants. Aside from being a director, the fourth defendant is the first defendant's Executive Vice-Chairman and Chief Executive Officer. The 13th defendant is also a private limited company having an issued and fully paid up capital of RM2.

[4] The plaintiff and the 12th defendant entered into a Software Licence and Marketing Agreement dated 21 May 2009 (the agreement). Under the agreement which was for a period of three years from 21 May 2009 to 21 May 2012, the plaintiff authorised the 12th defendant to license third parties to use the plaintiff's risk management solution software in return for commissions based on licence fees generated. Pursuant to cl. 3 of the agreement, the plaintiff would be paid certain sums for each year of the agreement.

[5] These contracting parties fell into dispute. Pursuant to cl. 11.3 of the agreement, the dispute was referred to arbitration in Singapore under the Arbitration Rules of the Singapore International Arbitration Centre (SIAC) following the plaintiff's notice of arbitration issued on 8 November 2010. The contracting parties were legally represented at the arbitration proceedings where both oral testimonies were taken and written submissions

made by both sides to the dispute. On 2 April 2012, the arbitral tribunal duly appointed under SIAC Rules rendered a partial award in the plaintiff's favour. This was later followed by an arbitration costs award on 15 October 2012, also in the plaintiff's favour. Both awards which are monetary in nature were not paid by the 12th defendant.

[6] On 17 April 2012, the plaintiff sued all 13 defendants as identified earlier. The plaintiff's claim against all 13 defendants, without distinction, is premised on six causes of action, namely, fraud, conspiracy to injure, inducing a breach of contract, breach of s. 304 of the Companies Act 1965, and unlawful interference with the plaintiff's economic interests; and specifically against the second and fifth defendants, that they are in breach of duty. As expressed by learned counsel for the respondent in his submissions:

> In summary, the plaintiff's complaint against the defendants is that the defendants and each of them have acted to deprive the plaintiff of the benefits of the Partial Award, the Costs Award and the sums payable by the 12th defendant under the Agreement in respect of years 2 and 3.

[7] In December 2012, the plaintiff amended its statement of claim to include events that took place after the suit was filed. In particular, the plaintiff pleaded about its own application for registration and enforcement of the award before the High Court at Kuala Lumpur. The 12th defendant opposed that application, filed on 6 April 2012. The application was allowed on 8 October 2012. Meanwhile, on 26 June 2012, the 12th defendant filed an application in the Singapore High Court to set aside the partial award. That application was dismissed on 20 September 2012. On 15 October 2012, the plaintiff served a notice pursuant to s. 218 of the Companies Act 1965 on the 12th defendant.

[8] At the trial, the plaintiff called only one witness, Richard Wallace Gollin Osborne, its Non-Executive Chairman and Director, who was cross-examined by the respective defendants. Upon close of the plaintiff's case, all the defendants advanced submissions of no case to answer.

[9] Following both oral and written submissions, the learned High Court Judge allowed the plaintiff's claim with costs, granting most of the orders sought save for prayers (vii) and (viii) on aggravated and exemplary damages, and prayer (ix) for a declaratory order that the agreement dated 29 March 2012 for the sale of the 12th defendant to the 13th defendant be declared null and void. Being dissatisfied, all 13 defendants appealed.

Decision Of The High Court

[10] In view of the submissions of no case to answer at the close of the plaintiff's case, the learned High Court Judge had to deal with how the plaintiff's claim ought to be considered. This is how His Lordship considered the matter after setting out the background facts.

[11] First, His Lordship was of the view that the basic facts and events were not in dispute. What was, were "… the implications, and how the court should view those facts and the consequences therefrom that the parties differ in regard to". Next, was the issue of the defendants' submission of no case to answer and their election not to call evidence. According to His Lordship:

> In such a situation the Court has to accept the plaintiff's evidence as true. Now the Court has to ask itself this question "If his evidence is presumed true then why should the Court not accept it as being credible?" Herein lies the answer: that the Court may say "Yes, it is presumed true but is it inherently incredible or improbable".

[12] Where the answer is in the affirmative in that if the court "… finds the plaintiff's evidence not inherently incredible or improbable", His Lordship said that the court then has "… to determine the issue of sufficiency that is whether upon an evaluation of whatever evidence has been put forward by the plaintiff, it is sufficient to establish on a balance of probabilities the plaintiff's overall case against all the defendants". In evaluating whether the evidence led is sufficient, His Lordship was of the view "… that the whole factual matrix has to be viewed from the evidential perspective in its totality". To better explain himself, His Lordship used a "… clichéd example, it is like a movie which you have to view from start to finish; you cannot segmentalise it. Viewing the factual matrix as if it were a movie, the bigger picture of a scheme appears, as borne out by the evidence".

[13] Upon applying the above considerations to the oral and documentary evidence produced by the plaintiff, the learned High Court Judge concluded that the elements of a scheme had been proved, and that the six causes of action were proved to exist. His Lordship found that the defendants had failed in their election and consequently ruled "in favour of the plaintiff as against all the defendants jointly and severally".

[14] On the existence of a scheme, His Lordship identified that the "plaintiff's evidence was that there was a scheme perpetrated by the defendants to ensure that the plaintiff was deprived of the fruits of its arbitration and the benefits that accrued under the agreement. In summary this was done by stripping the 12th defendant of its business and assets and ceasing its operation as well as removing the 12th defendant from the Formis Group by selling it to the 13th defendant, itself a dormant RM2 company". In this regard, His Lordship observed that both partial award and the costs award meant that the plaintiff was entitled to be paid certain sums by the 12th defendant. The partial award was received by the plaintiff on 2 April 2012 but on 30 March 2012, the first to the 11th defendants had published a general announcement to Bursa stating that:

> (a) the twelveth defendant had ceased operation one month earlier on 29 February 2012;

A (b) the twelveth defendant was being sold for RM1 to the thirteenth defendant;

(c) the thirteenth defendant was a dormant company with an issued and fully paid up capital of only RM2;

B (d) the proposed disposal was expected to be completed by the second quarter of 2012; ie, by 30 June 2012;

(e) upon completion of the proposed disposal, the twelveth defendant would cease to be a subsidiary of the first defendant.

[15] However, as observed by the learned judge:

C 21. On Monday, 2.4.2012 the 1st to the 11th defendants amended the General Announcement by amending the words "Proposed Disposal" to "Disposal" and deleted the sentence that the Proposed Disposal was expected to be completed by the second quarter of 2012.

D **[16]** According to His Lordship, this amendment "… meant that the disposal of the shares of the 12th due expedition which on 30 December 2012 was expected to be completed by the second quarter of 2012 had now been completed by the time the partial award was received". His Lordship "views this manoeuvre as a clear act to frustrate the plaintiff's enjoyment of the partial award as against the 12th defendant". According to His Lordship, E "there was no reason for the 12th defendant to be sold to the 13th defendant apart from the fact that it was done to frustrate the plaintiff's enjoyment of the partial award as against the 12th defendant".

[17] On the accountability of the defendants, His Lordship found that the F first 11 defendants had control over the 12th defendant and were aware of the arbitration as evidenced by the announcements to Bursa dated 23 November 2010 and 23 February 2012:

22. This Court also finds from the evidence that the 1st to the 11th defendants' control over the 12th defendant was tight, total and G absolute. The 1st defendant had purchased the 12th defendant for almost RM30 million as recently as 2005, and the 12th defendant generated substantial revenue for both the 1st defendant and the Formis Group, totaling approximately RM47.4 million (in 2010) and RM37 million (in 2011).

H 23. The control that the 1st defendant had over the 12th defendant was manifested by the 1st defendant being able to borrow at will from the 12th defendant.

[18] The 12th defendant's audited accounts were referred to in support. This led the court to make the following conclusion:

I 25. As such there was no reason for the 12th defendant to be sold to the 13th defendant apart from the fact that it was done to frustrate the plaintiff's enjoyment of the Partial Award as against the 12th defendant.

[19] His Lordship then applied "the evidence to the law" and found that the "defendants' scheme' was to and did in fact by way of a wilful act deprive by unjustifiable and fraudulent means what the plaintiff was entitled to under the partial award. In other words the object of the sale of the 12th defendant by the first to the 11th defendants was to fraudulently "defraud" the plaintiff of his existing right." His Lordship found that "the standard of proof of beyond a reasonable doubt has been met by the plaintiff through the evidence of SP1 and the documentary evidence relied upon by him".

[20] The court then proceeded to set out the elements required to establish each of the claims before making its appropriate findings. On the tort of conspiracy to injure, the High Court said:

> 30. Likewise here too, it is the finding of this Court that there was in existence an agreement between the 1st to the 11th defendants to injure the plaintiff by way of fraud, inducement of breach of contract, a breach of section 304 of the Companies Act 1965, a breach of Directors' duties to creditors, and unlawful interference with the plaintiff's economic interests. The result of this conspiracy was that the plaintiff has suffered loss and damage by not being able to enjoy the benefits of the Partial Award.

[21] On the claim of inducing a breach of contract, the learned High Court Judge said that:

> 32. This Court finds that the plaintiff has shown that by the scheme, the 12th defendant was prevented, hindered and rendered incapable of paying its current debts and its future debts to the plaintiff as well as performing its ongoing contractual obligations.

[22] On the complaint under s. 304 of the Companies Act, the learned High Court Judge found as follows:

> 35. In applying the evidence to the law it is the finding of this Court that the business of the 12th defendant was carried out with intention to defraud the plaintiff and this was done knowingly by the defendants.
>
> 36. It is also the finding of this Court that the 2nd and the 5th defendant as sole directors of the 12th defendant are in a special position and thereby responsible for the cessation of the 12th defendant as well as its business to be removed. As for the relevant law this Court adopts *Syuen Shen Motor Sdn Bhd v. Mayban Finance Bhd* [1996] 1 MLJ 520, *Winkworth v. Edward Baron Development Co Ltd & Ors* [1987] 1 All ER 114, *Dato Gan Ah Tee & Anor (in their capacity as Liquidators of Pay Advance Sdn Bhd (in Liquidation) v. Kuan Leo Choon & Ors* [2012] 10 MLJ 706 and *Kawin Industrial Sdn Bhd (in Liquidation) v. Tay Tiong Soong* [2009] 1 MLJ 723. There was therefore a breach of duty by the 1st and 5th defendant in regard to the 12th defendant which breach resulted in loss and damage to the plaintiff.

[23] On the tort of unlawful interference with the plaintiff's economic interests, once again, after setting out the requisite elements that must be established, the court said:

> 38. The intention to inflict harm to the plaintiff may either be an end in itself or a means to an end. However in our case this Court does not find the distinction to be relevant or useful for it is clear that the Scheme had occasioned loss and damage to the plaintiff. That the Scheme was unlawful has already been the subject of a finding by this Court. As such it is therefore the further finding of his Court that that the tort of unlawful interference in the plaintiff's interest has been proved.

[24] In short, the trial court found that the plaintiff had discharged the burden of proof and satisfactorily proved its case against all the defendants on a balance of probabilities. The claim was therefore allowed in the terms mentioned earlier.

Issues Raised In The Appeals

[25] There are common issues and grounds of appeal between the defendants. We shall therefore, deal with the arguments according to the issues raised, the common issues being:

(i) wrong test adopted for a no case to answer;

(ii) error in finding the existence of a scheme perpetrated by the defendants;

(iii) error in lifting the corporate veil and disregard of separate legal entity principle;

(iv) error in awarding damages for Years 2 and 3 of the agreement;

(v) ignoring indiscriminate allegations and vague evidence against individual defendants;

(vi) errors in finding that the various causes of action had been established.

[26] It is the common complaint of the defendants that the learned High Court Judge had applied the wrong test for a no case to answer. The defendants were submitting that there was no case to answer on the basis that the plaintiff had not made out a case against all the defendants as the evidence led by the plaintiff is insufficient to discharge its legal burden of proof to establish its claim. In such a case, it was erroneous for the trial judge to simply presume all statements of SP1 to be true and proceed to find that it was sufficient to discharge the legal burden. It was argued that what the learned High Court Judge ought to have done was to evaluate SP1's statements to determine if such statements should be accepted as evidence at all. If that had been done, His Lordship would have found SP1's statements unacceptable as evidence as his statements were merely conjecture and speculation. As one of the fundamental principles of evidence, unchanged by

a submission of no case to answer, statements are only acceptable as statements of fact where it is backed by personal knowledge of the witness or where there is clear documentary evidence. Otherwise, such statements remain as speculative, conjecture or opinion of the witness which are not acceptable at all as evidence and must be disregarded when considering on the sufficiency of evidence.

[27] A table marked as Appendix A demonstrating an evaluation of SP1's material or key assertions in his witness statement and further oral evidence as comprising mainly speculation, conjecture, opinion and hearsay as opposed to objective facts and proper inferences that can be drawn from such facts was prepared by learned counsel for the defendants in Civil Appeal No. W-02(NCVC)(W)-1337-08-2014.

[28] The related submission here is that contrary to the learned High Court Judge's view "…that the whole factual matrix has to be viewed from the evidential perspective in its totality… it is like a movie which you have to view from start to finish; you cannot segmentalise it", it was submitted that the court has to segmentalise and determine with certainty that each cause of action has been established and that the burden of proof for each cause of action has been satisfied. Because the learned High Court Judge had failed to observe that the evidence relied on by the plaintiff were inherently incredible and improbable after testing the same against the documentary evidence and the results of the cross-examination by the respective counsel for the defendants, it was submitted that appellate intervention was warranted.

[29] In response, learned counsel for the plaintiff submitted that the learned High Court Judge was correct in presuming the evidence of SP1 to be true as a matter of law because his evidence is well supported by documents, most of which originated from the defendants themselves. Since the evidence are within the knowledge and/or possession of the defendants, the burden of proving the facts was actually on the defendants pursuant to s. 106 of the Evidence Act 1950. Further and under such conditions, an adverse inference can be drawn under s. 114(g) of the Evidence Act 1950 against the defendants where the defendants have deliberately avoided calling any witnesses.

Decision Of This Court

[30] On the meaning and consequences or effect of a submission of no case to answer, we are guided by the recent decision of the apex court in *Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Naim* [2015] 2 CLJ 1037. In dealing with the issue of whether the appellate court can and ought to disturb findings of fact reached by the trial court where the evidence led by the plaintiff are assumed to be true when the defendants have elected not to call any witnesses, the Federal Court made the following two observations at p. 1059:

A [56] …**The first is that the principle on which an appellate court could interfere with findings of fact by the trial court is the plainly wrong test** (see *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 10 and *UEM Group Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785). **And, the second is that the burden of proof at all times is of course borne by the plaintiff to establish on the balance of probability**
B **the existence of a legally enforceable settlement agreement** (see *Ranbaxy (Malaysia) Sdn Bhd v. El Du Pont De Nemours and Company* [2011] 1 LNS 16; [2011] 1 AMCR 857). In other words, it was upon the plaintiff itself, and certainly not the defendant, to discharge the burden of showing the settlement agreement had come into existence. It is for the plaintiff to prove its case and satisfy the Court that its claim is well-founded before
C the Court grants judgment on the claim (see *Pemilik Dan Kesemua Orang Lain Yang Berkepentingan Dalam Kapal "Fordeco No 12" Dan "Fordeco No 17" v. Shanghai Hai Xing Shipping Co Ltd* [2000] 1 CLJ 695; [2000] 1 MLJ 449; *Maju Holdings Sdn Bhd v. Fortune Wealth (HK) Ltd & Other Appeals* [2004] 4 CLJ 282; [2004] 4 MLJ 105 and *Teh Swee Lip v. Jadewell Holdings Sdn Bhd*
D [2014] 8 CLJ 451; [2013] 6 MLJ 32)…

[57] We therefore agree with the submission of learned counsel for the defendant to the effect that despite the fact the defendant did not call any witness and that even if the plaintiff's evidence is unopposed (and therefore presumed to be true), this does not automatically equate to that evidence satisfying the burden of proving the existence of the settlement
E agreement borne by the plaintiff, or mean that the burden of proving on the balance of probabilities no longer applies, or that a case to answer is automatically made out. **The evidence adduced by the plaintiff must still be sufficient to prove the existence of the settlement agreement**. This crucial point was overlooked by the learned High Court Judge. On the factual matrix of the case, it is patently clear that the plaintiff has not
F discharged the burden. On this basis, the Court of Appeal was in every respect justified in holding that the learned High Court Judge was plainly wrong in making a ruling of law that the settlement agreement had come into existence based on the conduct of the both parties. Indeed, the election by the defendant to call no evidence at trial does not preclude
G the reversal of a plainly wrong finding of the learned High Court Judge by the Court of Appeal.

(emphasis added)

[31] We do well in reminding ourselves that at all times, the burden of proof lies with the plaintiff. The plaintiff has to establish its case on a civil
H burden of probabilities and with the recent decision of the Federal Court in *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584; [2015] 5 AMR 497, that includes where the cause of action is in fraud. Where the defendant opts to submit that there is no case to answer or meet at the close of the plaintiff's case, and the defendant is perfectly entitled to do so under
I the law, the defendant runs a huge risk. In the event the court disagrees with that submission, the defendant, who would have been put to election on the calling of witnesses upon making known its submission, is not allowed to change its mind. The defendant will have to stand or fall by its submissions.

[32] Where the defendant does not lead evidence to prove its defence or discharge the onus of proof which may have shifted to the defendant, then all that was available for the court to examine in order to determine the claim would be the plaintiff's version of the facts. It is in that context and sense that the case authorities frequently refer to the evidence adduced by the plaintiff as assumed true, correct or accurate. This makes sense as the court does not have any other version or evidence for comparison or evaluation.

[33] However, as espoused by the Federal Court in *Syarikat Kemajuan Timbermine Sdn Bhd*, "even if the plaintiff's evidence is unopposed (and therefore presumed to be true), this does not automatically equate to that evidence satisfying the burden of proving the existence of the settlement agreement borne by the plaintiff, or mean that the burden of proving on the balance of probabilities no longer applies, or that a case to answer is automatically made out. The evidence adduced by the plaintiff must still be sufficient to prove the existence of the settlement agreement". This means that the trial court is obliged to evaluate the evidence of the plaintiff. That evaluation is aided by considering *inter alia* whether the plaintiff's evidence is challenged successfully in cross-examination. Where the answer is in the affirmative, the assumption can no longer hold. Similarly, where the evidence led by the plaintiff contains inadmissible evidence such as hearsay, opinion, speculation or conjecture with the witness having no personal knowledge of the matters testified, then the assumption is also not available. Unrebutted evidence is not necessarily credible or good evidence as it may be inherently incredible or so unsatisfactory that it cannot be relied upon – see *Lim Swee Khiang and Another v. Borden Co (Pte) Ltd and Others* [2006] 4 SLR 745, 751. To suggest otherwise would be to turn the law of evidence on its head and leave the function of examination and cross-examination of witnesses a dead letter.

[34] Regardless whether a case is tried fully with evidence led by all parties, on a summary basis or as was the case here, through a submission of no case to answer, it is the primary function of the court to evaluate the plaintiff's claim. The court must appreciate what is the nature of the claim, whether it is founded in contract, tort, statute or a combination of all of these or more. This then sets the stage so to speak, that the relevant principles may be called into play and considered. The present case is no exception.

[35] At the time of filing of the claim on 17 April 2012, it is the clear case of the plaintiff, as evidenced by its statement of claim, that it has suffered loss and damage in that the 12th defendant is not able to pay the sums due under the partial award and under the agreement because of the various actions which are substantially actions in tort, allegedly committed by the defendants. This remained the plaintiff's claim even after it had amended its statement of claim to include the events following the issue of the partial award. It is not a case of the plaintiff not being paid but that the 12th

defendant is not able to pay these sums. The plaintiff blames all the defendants for that state of the 12th defendant, that state being the 12th defendant is not able to pay the plaintiff those stipulated sums; that the 12th defendant would not be able to meet or satisfy its obligations to the plaintiff under the agreement.

[36] Except for the statutory claim under s. 304 of the Companies Act 1965, the plaintiff's causes of action are all founded on fraud, conspiracy to injure, inducing a breach of contract, unlawful interference with the plaintiff's economic interests and breach of duty, all of which are necessarily tortious in nature. Bearing in mind that the basic relationship is between the plaintiff and the 12th defendant and that that relationship is purely contractual housed in the agreement, and that the claim is for the sums clearly arising under that agreement, the plaintiff's action against parties other than the 12th defendant must first surmount the fundamental principle of separate corporate legal entity. That principle is trite and too enshrined under our corporate laws to require setting out – see *Salomon v. Salomon Co Ltd* [1897] AC 22, *Solid Investments Ltd v. Alcatel Lucent (Malaysia) Sdn Bhd* [2014] 3 CLJ 73; [2014] 3 MLJ 785, *Tenaga Nasional Bhd v. Irham Niaga Sdn Bhd & Anor* [2011] 1 CLJ 491; [2011] 1 MLJ 752 and *Pamol (Sabah) Ltd & Anor v. Joseph Paulus Lantip & Ors* [2012] 1 LNS 466; [2012] 5 MLJ 616.

[37] This principle stands in the way of the plaintiff's claim and it is a principle that the court cannot ignore. The events complained of including the acquisition of the 12th defendant, the subsequent disposal of the 12th defendant to the 13th defendant, the inter-company borrowings, the decisions to cease operations, the writing off of debts, the running and management of business operations, announcements at Bursa Malaysia, are all events and matters which routinely occur in the corporate world and in the general scheme of doing business or running a corporation. The transactions and decisions of companies, though under one umbrella or group of companies remain the individual decisions of the particular company until and unless there are holdings out or representations, guarantees to the contrary. The shareholding of the company, be it by a single sole or by thousands of shareholders does not affect these principles. There is no obligation in law for any one of the companies in the group, or for the holding company, to be liable for the obligations of another within the group. For that matter, there is no obligation for a subsidiary, no matter how substantively owned by a holding company, to be liable for the obligations of its holding company. These firm principles allow corporations to breathe and function, to do business.

[38] In *Abdul Manaf Mohd Ghows & Ors v. Nusantara Timur Sdn Bhd* [1997] 4 CLJ 437; [1997] 3 MLJ 661, the Court of Appeal opined at p. 445 (CLJ); p. 668 (MLJ) that:

> The fact that the agreement was executed by the second and third respondents as directors of Nusantara Timur does not make the second and third respondents personally liable for the balance of the purchase

price. The liability of such payment under the agreement is solely Nusantara Timur's, the contracting party. We can do no better than to quote the trial judge's reasoning on this:

> A company incorporated under the Companies Act 1965 has its own separate legal entity, distinct from its members and officers. It can sue and be sued in its own name and, being an artificial person, it can only act through its directors and officers. It enters into an agreement through its directors and authorised officers. A director or an authorised officer of a company who executes an agreement on its behalf is merely acting as an agent of the company and is thereby not personally liable for the breaches or acts of the company, unless there are express provisions in the agreement or other document to the contrary making the director or officer personally liable for the breaches or acts of the company.

There is also a finding by the trial judge that there is no evidence both oral and documentary to establish that the second and third respondents held themselves out to be personally liable for the balance of the purchase price. There is no reason why we should not accept this finding…

[39] The present arrangements between the first defendant and the 12th defendant are no different. The directors or the Board of Directors who sit in both the companies are necessary so that these corporate soles may conduct business as the 12th defendant is an artificial sole. This does not mean that the directors incur or take on personal liability. The plaintiff's case is not that these directors or these are other companies, the first and 13th defendant had given personal or separate undertakings to the plaintiff in respect of the 12th defendant's obligations under the agreement. The liability of these directors and these other companies are limited by and under the law. The fact that these directors may be common to any number of companies does not alter that basic tenet of corporate law.

[40] In order to make any case for any cause of action or in this case, for any of the tortious causes of action pleaded against the defendants with whom the plaintiff has no contractual relationship with, the plaintiff must first and foremost, succeed in its proposition that the veil of incorporation of the 12th defendant has to be lifted. The law will only countenance the lifting of the veil of incorporation if fraud is established. Even the consideration of "interest of justice" has been checked in the Federal Court's decision in *Solid Investments Ltd v. Alcatel Lucent (Malaysia) Sdn Bhd* (*supra*) confirming the position taken by the Court of Appeal in *Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors* [2005] 3 CLJ 355 that it is "not open to the courts to disregard the corporate veil purely on the ground that it is in the interests of justice to do so". There must be "either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity…" to warrant the piercing of the corporate veil.

[41] The allegation that there are these various causes of action against these other defendants is in itself, certainly insufficient to breach that fundamental principle of corporate law. Fraud must be established before any claimant, without exception, is allowed to look behind the corporate sole with whom the claimant has contracted.

[42] In this case, there are, in fact, two veils that the plaintiff will have to pierce and pierce successfully. First, the plaintiff must succeed in establishing a case for piercing the veil of incorporation of the 12th defendant in order to hold the second and fifth defendants, the directors of the 12th defendant accountable. Second, the plaintiff must also establish a proper case of fraud before it is allowed to pierce another veil of yet another corporate sole, that of the first defendant's in order to render the remaining defendants who are the directors of the first defendant, jointly and severally liable for the matters complained of. There is also the matter of the 13th defendant. That, is the case that the plaintiff must meet in law.

[43] The learned judge dealt with this issue of separate corporate legal entities in paras. 22 and 23 of his judgment where His Lordship expressed the finding that the first to the eleventh defendants "control over the 12th defendant was tight, total and absolute". This control "was manifested by the first defendant being able to borrow at will from the 12th defendant" and because these defendants knew of the existing arbitration between the plaintiff and the 12th defendant. The learned judge observed from the audited accounts of the 12th defendant that the first defendant and other companies in the Formis Group owed the 12th defendant various sums from 2007 or 2008 to 2011; and that a debt of RM6,439,7000 from the first defendant to the 12th defendant was written off.

[44] The difficulty we have with these pleas and causes of action is this – that the plaintiff blames the defendants for the 12th defendant's inability to pay the partial award, the costs award and the two subsequent claims under the agreement. But, nowhere in the plaintiff's evidence or in SP1's testimony is there evidence of this inability. There are contentions of a refusal to pay and lack of responses to the plaintiff's letters demanding for payment. That, however, is far removed from amounting to evidence of an inability to pay. Certainly at the time of filing of the suit, it is unclear if even any cause of action has arisen as the plaintiff had yet to secure a recognition of the awards under the Arbitration Act 2005 (Act 646). The partial award was only recognised as enforceable as an order or judgment of the court on 8 October 2012. Thereafter, the plaintiff issued a s. 218 notice under the Companies Act 1965 on 15 October 2012; but there is no evidence as to what the plaintiff then did with enforcing that recognition order. By the time of the trial and as reflected in the amended statement of claim, the 12th defendant was wound up, by some third party. It is only at that point that the 12th defendant's ability to pay any debt comes under appropriate scrutiny. It may

even be said that it is only at this point that there is any possible cause of action against the 12th defendant. Anything prior to that date would be premature.

[45] When the 12th defendant was wound up, the plaintiff filed its proof of debt. The 12th defendant's claims are under the attention of the liquidator appointed to deal and manage with the financial affairs of the 12th defendant. It is difficult to see how the plaintiff has suffered any loss up till this appointment.

[46] Another aspect of the complaint that troubles this court is the plaintiff's allegation that the defendants are liable for the 12th defendant not being able to satisfy its obligations under the agreement. The difficulty we have with that argument is the matter of how any company or person's inability to pay or satisfy a debt becomes the liability of another. Until that inability is translated or crystallised into a debt, it remains purely an allegation which has no merit. It is not the non-ability to pay but the non-payment that is the damage. Until that refusal and non-payment is manifested in enforcement proceedings, there is no cause of complaint. A person or corporate sole may display lack of financial ability to pay but that is immaterial as a debt may be settled or paid by any other means, such as borrowings or by some third party.

[47] Given these material legal issues and considerations which were overlooked and not addressed by the learned High Court Judge, this appeal warrants intervention on this point alone. With no actionable claim established in law, the plaintiff's claim is not proved and consequently, must stand dismissed.

[48] Insofar as the allegation of a "scheme" is concerned, and this lies at the nub of the factual matrix and in turn forms the whole substratum of the plaintiff's claims and causes of action, we also find the evaluation by the learned High Court Judge erroneous.

[49] In the plaintiff's terms, the scheme is simple – the defendants intended that the plaintiff be deprived of the fruits of its arbitration and the benefits under the agreement. That intention was realised by stripping the 12th defendant of its business and assets, ceasing its operation and removing the 12th defendant from the Formis Group by selling it to the 13th defendant, a dormant RM2 company, for RM1. In other words, these acts of the defendants were "a wilful act" to "deprive by unjustifiable and fraudulent means what the plaintiff was entitled to under the partial award".

[50] The learned High Court Judge found the scheme established by the evidence of SP1, the several announcements made by the first defendant, the audited accounts of the 12th defendant, and the fact that the 13th defendant is a RM2 dormant company. His Lordship found the borrowings by the first defendant from the 12th defendant and the writing off of a debt of over RM6

million as "stripping the 12th defendant of its business and assets". Together with the disposal of the 12th defendant to a dormant RM2 company in the character of the 13th defendant, these are wilful acts and unjustifiable and fraudulent means. According to His Lordship, "there was no reason for the 12th defendant to be sold to the 13th defendant apart from the fact that it was done to frustrate the plaintiff's enjoyment of the partial award as against the 12th defendant. In other words the object of the sale of the 12th defendant by the first to the 11th defendants was to fraudulently "defraud" the plaintiff of his existing right".

[51] Whether fraud exists is a question of fact. It must be actual fraud that is dishonesty of some sort. It implies a wilful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled. If the designed object of a transfer is to cheat a man of a known existing right, that is fraudulent.

[52] It is undeniable that there is no allegation of actual fraud in the present facts. What the plaintiff was actually doing was to invite the court to infer dishonesty or materially, that the events of purchasing and ownership of the 12th defendant by the first defendant back in 2007, the borrowings between the companies from around that time, a period which includes when the arrangements between the plaintiff and the 12th defendant had not even taken place; the disposal and the announcements, as amounting to a scheme which is fraudulent in nature and intent, meeting all the elements of the six causes of action launched at the defendants, without distinction. The plaintiff is contending that all these surrounding circumstances are capable of establishing a *prima facie* case of intent to defraud. If the plaintiff is correct, then the onus shifts on the defendants to disprove – see *PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd* [1980] 1 LNS 55; [1980] 2 MLJ 136, 137.

[53] But, given that the above circumstances, events and matters are construed and inferred by the learned High Court Judge as amounting to a scheme with fraudulent overtones when these are in fact ordinary transactions and decisions of business and commerce, with respect, we are unable to see how that inference and conclusion can be safely and reasonably drawn by the learned judge. These same circumstances, events and matters occurred over a period of time well before the plaintiff and the 12th defendant were in contract; and certainly these events are unrelated to the award. There is no evidence that the defendants, any of them, knew what the award would be. There is nothing untoward let alone sinister in the first defendant or the directors knowing of the arbitration or that an award would be rendered. Knowledge of these matters is not and does not amount in law to intent to defraud or commit any of the torts complained of. More is required and there is no evidence of any degree before the trial court for the learned High Court Judge to conclude as he did. These events and matters

are capable of more than one inference. Where that is the case, the sinister inference cannot be preferred without more even where the burden is one on a balance of probabilities. The Court of Appeal had expressed to this effect in *Heller Factoring (M) Sdn Bhd (Formerly Known As Matang Factoring Sdn Bhd) v. Metalco Industries (M) Sdn Bhd* [1995] 3 CLJ 9; [1995] 2 MLJ 153, 177:

> It is well established that when two inferences are equally open from the same set of facts, the sinister inference is not preferred.

[54] The evidence show that the 12th defendant was already a loss making company even before it entered into the contract with the plaintiff. Its audited accounts for the years ended 31 March 2007 and 2008 (pp. 90 and 100) already showed the 12th defendant as a loss making entity prior to the plaintiff entering into contract with the 12th defendant. On the basis of the accounts, the 12th defendant was consistently making losses. SP1 had agreed in cross-examination that revenue generation does not necessarily translate into profitability. In evidence, SP1 had also testified that he had no idea what had happened to the assets of the 12th defendant, assuming for a moment that he had identified the assets to start with, which he had not. There is therefore no basis for any of the allegations made.

[55] We further disagree with the learned High Court Judge that the various causes of action can be dealt with without segmentalising them. The elements that must be fulfilled before any of the causes of action are established are different in each cause of action. Care and proper evaluation must be accorded. With respect, it was erroneous for the learned High Court Judge to have addressed them in the manner that he did.

[56] The learned High Court Judge was also required to address the liability of each defendant. The two paragraphs identified earlier are highly inadequate to find each of them as bearing the intent that is required for each cause of action, especially given the fact that the decisions are routine and part of the ordinary course of business, with nothing to suggest improper motive. This failure is also another reason why the appeal should be allowed.

[57] We therefore agree with the defendants that the plaintiff had failed to establish its case on a balance of probabilities. The evidence of SP1 was weak, substantially inadmissible and not backed by any documentary proof. The same documentary evidence is plainly capable of another reason or interpretation. Where that explanation is the ordinary and reasonable explanation and the way business operations are run, there must be sufficient evidence led to dislodge that ordinariness. Even SP1 himself admits to the availability of other reasons or explanations, and that his concerns were misplaced. The events and matters complained of are not evidence of a scheme but simply part of doing business.

A

Conclusion

[58] For all the above reasons, the decision of the learned High Court Judge is plainly wrong and we are therefore inclined to allow all the four appeals with costs and we do so accordingly. In the matter of costs, we order the following sums as costs here and below to be paid by the plaintiff, the first respondent to the appellants in all four appeals:

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(i) W-02(NCVC)(W)-1337-08-2014: the sum of RM130,000;

(ii) W-02(NCVC)(W)-1383-08-2014: the sum of RM40,000;

(iii) W-02(NCVC)(W)-1384-08-2014: the sum of RM30,000;

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(iv) W-02(NCVC)(W)-1407-08-2014: the sum of RM30,000.

All costs are subject to the payment of allocatur. The deposits in the respective appeals are refunded.

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